SHEK KWOK BUN, ALEXANDER JOHN

v.

WAB KELUARGA REALTY SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[CIVIL APPEAL NO: 12-38-2000-II]
4 DECEMBER 2001

CIVIL PROCEDURE: *Appeal - Appeal from decision of sessions judge - Whether decision disposed of final rights of parties on matters in dispute - Whether decision appealable*

The sessions judge dismissed the appellant's application for summary judgment against the respondent on the basis that there were triable issues. The appellant now appealed against that decision. The respondent raised a preliminary objection that the decision of the sessions judge was not a final order and therefore not appealable. The appellant claimed that since this appeal was by way of a re-hearing, the matter was to be heard all over again. Therefore, the issue whether the decision of the sessions judge was appealable or not did not arise.

Held:

[1] Section 29 of the Courts of Judicature Act 1964 ('CJA') states that the mode of hearing of an appeal is by way of re-hearing. The re-hearing could only be done through an appeal. The right to appeal is a pre-condition to the re-hearing. Under no circumstances could the appellant come before this court to have the present application re-litigated except by way of an appeal. Therefore, it was crucial for the court to decide whether or not the decision of the sessions judge was appealable. (p 482 c-e)

[2] The sessions judge ruled that there were triable issues in this matter and therefore not a proper and fit case for summary judgment. It was clear that her ruling did not fall under the meaning of 'decision' under s. 3 CJA as it did not finally dispose of the appellant's right against the respondent on the matters in dispute. The main suit by the appellant against the respondent was still pending. As such, the appellant still had the chance to prove his case against the respondent. (pp 482 g & 483 h)

[3] The relevant provision applicable to appeals from the subordinate court to the High Court is s. 28(1) CJA which hinged on the word 'decision'. (p 484 d-f)

[Appeal dismissed.]

Case(s) referred to:
Bozson v. Altrincham [1903] 1 KB 547 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 ***(foll)***
Ismail Abdul Hamid v. OSK & Partners Sdn Bhd [1997] 1 CLJ 583 ***(dist)***
Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd [2001] 5 CLJ 194 ***(refd)***
Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd [1999] 1 CLJ 337 ***(dist)***
Ratnam v. Cumarasamy & Anor [1962] MLJ 330 ***(refd)***
Subran Kunhikuttan v. Aladath Putham Veetal Moidutty [1997] 4 CLJ 91 ***(dist)***
Tetuan J & S Holdings Sdn Bhd v. A Karim Hassan [2000] 4 CLJ 152 ***(foll)***
Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 ***(dist)***
Vong Ban Hin v. Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 28(1), 29, 50(2), 67(1)
Subordinate Courts Rules 1980, O. 12 r. 5(1), O. 26A, O. 46 r. 6, O. 49 r. 6

For the appellant - Chan Kay Poh; M/s Chan & Chan
For the respondent - John Shek; M/s John Shek & Co

Reported by Usha Thiagarajah

JUDGMENT

Zakaria Sam JC:

On 14 May 1999, the plaintiff filed an action against the appellant/defendant (after this defendant) *vide* Sessions Court case No. 51-10-99-II claiming against the defendant for increased tax of 10% and 5% respectively, amounting to RM76,095.15, together with interests and costs.

On 20 November 1999, the defendant took out a 3rd party notice against the respondent, claiming contribution and/or indemnity from the respondent in respect of the plaintiff's claim. On 27 December 1999 the respondent filed and served its defence to the 3rd party notice.

On 23 December 1999, the defendant filed a notice of application under O. 12 r. 5(1) and O. 26A of the Subordinate Courts Rules 1980 (SCR), for summary judgment to be signed against the respondent for the sum RM75,924.61 only with interests and costs. The respondent opposed this application.

On 27 October 2000, the learned sessions judge decided that there were triable issues and dismissed the defendant's notice of application with costs.

Being dissatisfied with the decision of the learned sessions judge, the defendant appealed.

At the hearing of the appeal, the respondant raised a preliminary objection in that the decision of the learned sessions judge is not a final order and therefore not appealable.

In reply, the learned counsel for the defendant argued that the present appeal before this court is by way of rehearing. He cited s. 29 of the Courts of Judicature Act 1964 (CJA) to support his argument. He claimed that the preliminary objection raised by the respondent is a tactic by the respondent to delay the hearing of this appeal.

The learned counsel for the defendant further explained that since this appeal is by way of rehearing, the matter is to be heard all over again before this court. Therefore, the issue whether the decision of the learned sessions judge is appealable or not does not arise. With due respect, I find that there is no merit in this argument. Section 29 CJA provides:

> All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdictions on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

The abovesaid provisions spell out the mode of hearing of an appeal ie, by way of rehearing. The rehearing could only be done through an appeal. The right to appeal is a pre-condition to the rehearing. Under no circumstances can the defendant come before this court to have the present application relitigated except by way of appeal. Therefore it is crucial for this court to firstly decide, whether or not the decision of the learned sessions judge is appealable.

In order to do so, it is desirable for this court to hear the preliminary objection raised by the respondent ie, whether the defendant has the right to appeal against the decision of the learned sessions judge, dismissing his application for summary judgment.

The learned sessions judge had ruled that there were triable issues in this matter and that this is not a proper and fit case for summary judgment. It is clear that her ruling does not fall under the meaning of 'decision' under s. 3 CJA. The amendment to the meaning of 'decision' (which was added by Amendment Act A1031 of 1998 and came into force on 31 July 1998) was referred to by His Lordship NH Chan JCA in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537, in the following passage:

> This new definition of 'decision', as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the 'decision' is the type of judgments and orders which is termed 'interlocutory' (at page 329).

His Lordship further said:

> Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s. 3 of the Act, and therefore is not appealable. (at page 330).

Lord Alverstone in *Bozson v. Altrincham* [1903] 1 KB 547 laid down the following test in deciding whether an order was interlocutory or final:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then ... it ought to be treated as a final order; but if it does not, it is then ... an interlocutory order.

This test was adopted with approval by the Court of Appeal in *Ratnam v. Cumarasamy & Anor* [1962] MLJ 330 and also followed in *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd* [2001] 5 CLJ 194.

In *Tetuan J & S Holdings Sdn Bhd v. A Karim b. Hassan* [2000] 4 CLJ 152, VT Singam JC was of the view that:

> In order to determine whether an order or decision is final, that order or decision must have determined the principal matter before the court thereby having concluded the main dispute and consequently, does not require further hearing or decision of the case to be made by the court on the whole of the proceedings. In other words, the order or decision should not have dealt with the final rights of the parties on the subject matter in dispute which means, it is not conclusive of the main suit. In such a situation, the order or decision is not appealable within the meaning of the word 'decision' as defined in s. 3 of the Courts of Judicature Act 1964.
>
> On the other hand, if the order or decision finally disposes of the principal matter or the subject matter in dispute thereby bringing a conclusion to the whole of the proceedings without further date of hearing, it is the view of this court that the order or decision in those circumstances is appealable.

I agree with his view.

In the instant appeal, the decision by the learned sessions judge in dismissing the defendant's application for summary judgment did not finally dispose of the defendant's right against the respondent. The main suit by the defendant against the respondent is still pending. As such, he still has the chance to prove his case against the respondent.

The case of *Ismail b Abdul Hamid v. OSK & Partners Sdn Bhd* [1997] 1 CLJ 583 cited by the learned counsel for the defendant is not relevant here as the facts are distinguishable. In that case, summary judgment had been entered against the defendant. The defendant's right had finally been disposed of, therefore the right of appeal is available to him. Furthermore, the issue in that case is not the right of appeal but in which registry the notice of appeal ought to be filed by the defendant.

The learned counsel for the defendant also cited the case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377 where the Court of Appeal held that in civil appeal, the relevant provisions applicable would be that of s. 67(1) CJA. As the word 'decision' is not used in s. 67(1), there is no compelling reason to refer to s. 3 CJA for the meaning of the said word. The phrase 'from any judgment or order' is not to be confused with the meaning given to the word 'decision' in the current version of s. 3 CJA. With due respect, the learned counsel for the defendant failed to differentiate between appeals from High Court to Court of Appeal and appeals from the Subordinate Court to the High Court. The relevant provisions applicable here are s. 28(1) CJA, which read:

> Subject to any other written law no appeal shall lie to the High Court from a decision of the subordinate court in any civil cause or matter ...

It is clear that, as opposed to s. 67(1), s. 28(1) CJA used the word 'decision'. Therefore the authority in *Tycoon Realty*'s case is not applicable to the facts of the present case. Though *Dato' Seri Anwar*'s case is in reference to a criminal appeal, the findings of the Court of Appeal there, are also applicable to civil appeal from the subordinate court to the High Court as both provisions ie, s. 50(2) and s. 28(1) CJA hinged on the word 'decision'.

The case of *Vong Ban Hin v. Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 cited by the learned counsel for the defendant, is also not relevant as it was based on the old O. 46 r. 6 of SCR as amended by P.U.(A) 193 of 1993 which is in line with the old definition of the word 'decision'. However, O. 49 r. 6 has now been substituted by P.U.(A) 343 of 2000 w.e.f. 7 June 2000 and the new definition of the word 'decision' in s. 3 CJA as amended (w.e.f. 31 July 1998), exclude appeal against interlocutory orders. For the same reason, the case *Subran @ Subramaniam a/l Kunhikuttan v. Aladath Putham Veetal Moidutty* [1997] 4 CLJ 91 and *Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd* [1999] 1 CLJ 337 are also not authorities for the current definition of the word 'decision'.

Conclusion

In the present appeal, the dismissal of the defendant's application under O. 26 SCR against the respondent did not finally dispose of the right of the defendant and therefore, in my opinion, certainly not a proper matter for appeal. In the absence of the right to appeal, the defendant has no *locus standi* to have his application for summary judgment to be reheard by this court.

The preliminary objection of the respondent is hereby upheld and the appeal is struck off with costs.